JOHN NANALOOK

IBLA 74-332 Decided October 29, 1974

Appeal from Bureau of Land Management decision rejecting Native Allotment application, A-055103.

Modified and remanded.

1. Alaska: Native Allotments--Words and Phrases

> "Use and occupancy" under the Alaska Native Allotment Act contemplates possession at least potentially to the exclusion of others and not mere intermittent use. However, consideration must be afforded to native customs and mode of living, climate and character of land; and permanent improvements indicating use may not be a prerequisite in appropriate circumstances where the claim is supported by sworn statements of credible witnesses with first hand knowledge of the facts, and where there are no conflicting adverse parties.

APPEARANCES: James Grandjean, Esq., Alaska Legal Services Corporation, for appellant.

OPINION BY ADMINISTRATIVE JUDGE RITVO

John Nanalook has appealed from a May 7, 1974, decision of the Alaska State Office, Bureau of Land Management (BLM), rejecting his Alaska Native allotment application filed pursuant to 43 U.S.C. §§ 270-1 through 270-3 (1970) and 43 CFR 2561. The decision recited that "the information submitted is not sufficient to indicate substantial actual possession and use of the land to the potential exclusion of use by others."

Appellant filed his allotment application on July 17, 1961. He recited that occupation and use had commenced on February 23, 1961. The application described approximately 120 acres in secs. 17 and 18, T. 12 S., R. 59 W., S.M.; this is approximately 15 air miles northwest of the native village of Manokotak, appellant's permanent residence. Appellant's evidence of occupancy statement, filed in 1967, recites that he used the land for fishing since 1961 during the months of August and September and that he uses the land for trapping and fishing from November through March. The purchase application stated that appellant had erected a tent-frame and fish racks.

On August 27, 1973, a qualified realty specialist of the BLM made a thorough on-the-ground examination of the allotment site. Accompanied by a native guide, the examiner gained access to the land applied for by helicopter. The tract was identified both from the air and on the ground; except for appellant's single posting at the southeast corner of the claim there was no visual evidence of use. Diligent examination on the ground failed to disclose any fish rack, tent frame, fish nets, or other evidence of human occupation such as discarded fish heads, skeletons, camp sites, etc. A fish or meat rack was identified on the contiguous allotment of Gusma Medicine. The Manokotak Village Council members substantiated the applicant's claimed use of the land. However, photographs of the site fully substantiate the realty specialist's observations that the land shows no sign of human use.

Appellant was advised of the report of field examination and was invited to submit further evidence relative to the existence of fish racks and tent frame or which would otherwise disclose some physical evidence of occupancy. Appellant submitted a statement to the effect that he removed the fish racks to a nearby island "because the bears were bothering the fish, but I've gotten fish from there every year and the village people pick berries there." His statement was accompanied with a certification by seventeen Village residents to the continued use and occupation of the land by appellant from 1961 to the present time.

The land here involved is within the 25-township withdrawal made for the native village of Manokotak in accordance with sec. 11, Alaska Native Claims Settlement Act, 43 U.S.C. § 1610 (Supp. II, 1972). It appears that the village council members' statements may be in the nature of statements against interest and

entitled to great credence. 1/ The question is whether an allotment may issue where the applicant leaves no visible evidence of his occupancy.

The Allotment Act, supra, as supplemented by the Act of August 2, 1956, provides that the Secretary "in his discretion and under such rules as he may prescribe" may allot not more than 160 acres to a Native who "has made proof satisfactory to the Secretary of the Interior of substantially continuous use and occupancy of the land for a period of five years." [Emphasis added]

[1] In Herbert H. Hilscher, 67 I.D. 410 (1960), the Department said:

> Occupancy implies some substantial actual possession and use of land, at least potentially exclusive of others * * *. Such slight and sporadic use of land as shown by the allotment applicant's storing a boat thereon is neither exclusive nor substantial, and, by itself, amounts to actual occupancy of no larger an area than is required for depositing a boat * * *. In the instant case there is evidence that no one has resided on the land for many years, and that only a small area along the beach on this tract has been even casually used or occupied * * *. This evidence will not support a conclusion that in 1954 the tract was occupied * * *. [At p. 416.]

The present regulation, 43 CFR 2561.0-5, reads as follows:

> (a) The term "substantially continuous use and occupancy" contemplates the customary seasonality of use and occupancy by the applicant of any land used by him for his livelihood and well-being and that of his family.

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1/ In a letter of July 30, 1974, to Mr. Roger Lang, President, Alaska Federation of Natives, Inc., Assistant Secretary Hughes, in pertinent part, said:

> 11. In considering evidence of use, sworn statements by witnesses who have firsthand knowledge of the facts will be given substantial weight on the matters to which they testify * * *

> Such use and occupancy must be substantial actual possession and use of the land, at least potentially exclusive of others, and not merely intermittent use.

The Solicitor again discussed "use and occupancy" in his Opinion, 71 I.D. 340, 354-359 (1964). 2/ He made clear that the Secretary is authorized to consider native customs and mode of living, climate and character of land applied for. He has directed that a determination of use and occupancy shall be in accordance with the Natives mode of life, the climate, and character of the land. 3/

In the instant case, there are no conflicting rights under the general land laws. The land involved is within an area of almost exclusive Native use and is even now withdrawn for possible Native village selection. Further, the village councilmen and others recognize appellant's exclusive use considering the climate and character of the land. Therefore, in appropriate circumstances, allotment may issue. However we believe that this allotment may not be authorized unless and until appellant has an opportunity to satisfactorily explain the manner of his use and occupation. Although appellant stated in his application that he uses and occupies the land each year during the months of August and September, there was no sign of his presence on August 27, 1973, the date of the inspection.

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2/ The Opinion cited Hilscher, noting that the principle therein had been established by judicial authority in United States v. 10.95 Acres of Land in Juneau, 75 F. Supp 841 (Alaska, 1948); United States v. Libby, McNeil & Libby, 107 F. Supp 697, 701 (Alaska, 1952); and United States v. Alaska, 201 F. Supp. 796, 799-800 (Alaska, 1962).

3/ In his Instruction of October 18, 1973, Assistant Secretary Jack O. Horton, in pertinent part, directed as follows:

"FIELD EXAMINATION GUIDELINES:

1. Field examinations should take into consideration Native traditional and customary occupancy of land and the way of life of the Native people.

2. Field examiners will accept affidavits from persons claiming knowledge of Native use and occupancy of land being examined and may seek BIA assistance in obtaining such information.

Fn. 3 (Cont.)

3. In making a determination that a Native has completed five years of substantial use and occupancy, the existence of any of the following evidence may be considered:

a. House or cabin.

b. Food cache.

c. Camp site -- evidence of tent, tent frame or temporary shelter, fire pits, cleared area.

d. Fish wheel.

e. Dock or boat landing.

f. Evidence of fishing, hunting and trapping such as fish drying racks, etc.

g. Reindeer headquarters and corrals.

h. Evidence of berry picking, gathering of wild roots, greens and other wild foods.

i. Other evidence of use should be considered such as animal bones, meat racks, fur caches, stretch boards, sledge dog spots, any sheds or holes, and pits or spots that show human use and occupancy.

"Substantial use and occupancy cannot be defined in any more detail than in the regulations. It will depend largely upon the mode of living of the Native. Use and occupancy by an Aleut or an Indian may not be the same as by an Eskimo. Therefore, the customs of the applicant must be considered and applied to the findings to arrive at a conclusion as to whether the land is being used as claimed. Customs of the Natives must be correlated with the physical findings -- improvements, vegetation, evidence of use, climate, and resources on the land, particularly with reference to the claimed use.

"The field report must contain an adequate description of the land, its improvements, and observed uses to verify the claimed use. This description should be supported by sketch maps and photos. The field report should clearly describe the areas of use and occupancy."

Therefore, pursuant to the authority delegated by the Secretary of the Interior to the Board of Land Appeals, 43 CFR 4.1, the decision appealed from is modified. BLM will notify appellant of the additional information or evidence it deems necessary and will afford Mr. Nanalook a reasonable time in which to submit such evidence, failing in which the decision rejecting the application will be allowed to stand.

Martin Ritvo
Administrative Judge

I concur:

Douglas E. Henriques
Administrative Judge,

I concur in the result:

Joan B. Thompson
Administrative Judge